Supreme Court, U.S.
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No. 09-754

In the Supreme Court of the United States

MIDWEST PIPE INSULATION, INC.,
Petitioner,

vs.

MINNEAPOLIS PIPEFITTERS UNION, LOCAL 539,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state-law tort claim is preempted under the *Garmon* doctrine if it is premised on alleged conduct that is actually or arguably prohibited by the National Labor Relations Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE PETITION..... 4

I. *GARMON* PREEMPTION IS WELL ESTABLISHED LAW..... 5

II. THIS LAWSUIT IS PLAINLY PREEMPTED UNDER *GARMON* BECAUSE, ON ITS FACE, THE ALLEGED CONDUCT FALLS SQUARELY WITHIN THE NLRA'S PROHIBITION ON SECONDARY ACTIVITY 7

III. THE MINNESOTA SUPREME COURT PROPERLY DECLINED TO ADDRESS WHETHER THE ALLEGED CONDUCT WAS *PROTECTED* BY THE NLRA BECAUSE THE CONDUCT WAS ARGUABLY *PROHIBITED* BY THE NLRA SUCH THAT *GARMON* PREEMPTION APPLIES..... 11

CONCLUSION..... 15

TABLE OF AUTHORITIES

CASES Page

Federal Cases

Am. Steel Erectors v. Iron Workers Local 7,
536 F.3d 68 (1st Cir. 2008)..... 14

BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners of Am.,
90 F.3d 1318 (8th Cir. 1996)..... 8

Building & Const. Trades Dep't v. Reich,
40 F.3d 1275 (D.C. Cir. 1994)..... 13

Farmer, Special Adm'r. v. United Bhd. of Carpenters & Joiners of America, Local 25, et al.,
430 U.S. 290 (1977)..... 6

International Broth. of Elec. Workers, Local 357, AFL-CIO v. Brock,
68 F.3d 1194 (9th Cir. 1995)..... 13

NLRB v. Twin City Carpenters District Council,
422 F.2d 309 (8th Cir. 1970)..... 10

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959)..... *passim*

Soft Drink Workers Union Local 812 v. NLRB,
657 F.2d 1252 (D.C. Cir. 1980).....9, 9-10

Wisconsin v. Gould,
475 U.S. 282, 286 (1986)..... 7

National Labor Relations Board Cases

Associated Builders and Contractors, Inc.,
331 NLRB No. 5 (2000)..... 13

Can-Am Plumbing, Inc., 335 NLRB 1217 (2001), *rev'd and remanded*,
321 F.3d 145 (D.C. Cir. 2003), *aff'd on reh'g*,
350 NLRB No. 75 (2007)..... 13

Carpenters, Local 112,
217 NLRB 902 (1975)..... 9

Kingston Constructors,
332 NLRB 1492 (2000)..... 13

Manno Elec., Inc.,
321 NLRB 278 (1996)..... 13

Minnesota State Cases

Hennepin Broadcasting Assocs. v. American Fed'n of Television & Radio Artists,
223 N.W.2d 391 (Minn. 1974)..... 6

STATUTES

Federal Statutes

29 U.S.C. §§ 151, *et seq*..... 4

29 U.S.C. § 157..... *passim*

29 U.S.C. § 158(b)(4)..... *passim*

29 U.S.C. § 158(b)(4)(ii)(B)..... *passim*

40 U.S.C. 3141-3148..... 2, 11-12, 13

State Statutes

Minn. Stat. §§ 177.41, *et seq*..... 2, 13

STATEMENT OF THE CASE

In this case the unanimous Minnesota Supreme Court applied the *Garmon* preemption doctrine to dismiss a state-law tort claim that on its face alleges conduct arguably prohibited by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4)(ii)(B). This was a straightforward application of long-established law.

As this case was decided on a motion for judgment on the pleadings, the relevant fact allegations are contained in the Complaint of Petitioner Midwest Pipe Insulation, Inc., d/b/a MPI, Inc., ("MPI") (Pet. App. 49-57.) The central allegation in the Complaint is that Respondent Minneapolis Pipefitters Union, Local 539 ("Local 539" or "the Union") purportedly threatened to withdraw a grant of money from its market recovery program to a unionized pipefitting contractor to force that contractor to breach its subcontract with Petitioner for insulation work on a school construction project. (Pet. App. 52.) The Minnesota Supreme Court ruled that this alleged conduct arguably constitutes secondary boycott activity that is prohibited by the NLRA, 29 U.S.C. § 158(b)(4)(ii)(B), and thus the lawsuit is preempted under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). (Pet. App. 21-29.)

Local 539's market recovery program offers grants of funds to contractors on certain construction projects for purposes of organizing and increasing job opportunities for Local 539's members. (Pet. App. 22-23, 50-51.) As a condition of receiving funds from the program, the contractor must agree to be or become

signatory to Local 539's collective bargaining agreement and that all covered pipefitter work on the project will be performed by pipefitters dispatched from Local 539. (*Id.*) MPI alleges that the market recovery program is funded, in whole or in part, by dues deductions from employees' wages and that some of these dues are deducted on federal and state prevailing wage projects. (Pet. App. 51.) On about June 8, 2006, Local 539 agreed to provide a market recovery grant of $80,000 to unionized pipefitting contractor MD Mechanical, Inc. ("MD") relating to pipefitting work on the St. Michael-Albertville Elementary School Construction Project ("the Project"). (Pet. App. 24, 50.) The Project was *not* covered by the Federal Davis-Bacon Act, 40 U.S.C. §§ 3141-48, or the Minnesota Prevailing Wage Act, Minn. Stat. §§ 177.41 *et seq.* (Pet. App. 23, 59.)

On about June 8, 2006, MPI submitted a bid to MD to perform insulation work on the Project. (Pet. App. 52.) On about June 26, 2006, MD accepted MPI's bid of $166,800, and sent MPI a standard subcontract agreement signed by the president of MD. (*Id.*) On about July 11, 2006, MD's president allegedly contacted MPI and stated that Local 539 had "threatened" to rescind the grant of money from its market recovery program to "force" MPI to breach its subcontract and "hire a union signatory contractor to replace MPI." (*Id.*) On about July 11, 2006, MD allegedly sent a letter to MPI terminating and breaching the subcontract agreement with MPI "as a result of Local 539's threat." (*Id.*) Local 539 vigorously denies these allegations. (Pet. App. 60-61.) Local 539 does not even represent insulators and its

collective bargaining agreement does not cover insulation work. (Pet. App. 59.)

On May 10, 2007, MPI commenced this lawsuit in Hennepin County District Court against Respondent Local 539 and Defendant MD Mechanical, Inc. (Pet. App. 49-57.) The Complaint asserted claims of tortious interference with contract, unfair competition, and violation of the Minnesota Prevailing Wage Act. (Pet. App. 52-55.) On May 29, 2007, Local 539 served its Answer to the Complaint. (Pet. App. 58-64.)

Local 539 filed a motion for judgment on the pleadings pursuant to Minn. R. Civ. P. 12.03. (Pet. App. 1-7.) After receiving Local 539's brief, MPI voluntarily dismissed its prevailing wage claim, voluntarily dismissed MD from the case, and conceded that its unfair competition claim merely duplicated its tortious interference claim. (Pet. App. 4.) On August 23, 2007, the District Court granted Local 539's motion for judgment on the pleadings, ruling that MPI's state-law tortious interference claim was preempted under *Garmon*. (Pet. App. 1-7.) On August 26, 2008, the Court of Appeals reversed the District Court's decision and ruled that MPI's tortious interference claim was not preempted under *Garmon*. (Pet. App. 8-20.)

On August 29, 2008, Local 539 filed a charge with the National Labor Relations Board ("NLRB") alleging that this lawsuit unlawfully interfered with rights protected by the NLRA. (Pet. App. 30-39.) The NLRB's General Counsel recommended dismissal of the charge, but found that "the lawsuit's focus on conduct actually *prohibited* by the Act renders it

preempted under *Garmon*." (Pet. App. 36.) (emphasis added).

On August 6, 2009, the Minnesota Supreme Court reversed the decision of the Court of Appeals. (Pet. App. 21-29.) The Court dismissed the state-law tort claim under the *Garmon* doctrine because the lawsuit involved alleged conduct that arguably constituted secondary boycott activity prohibited by the NLRA. (Pet. App. 26-29.) Judgment was entered and filed on September 28, 2009. (Pet. App. 40-41.)

REASONS FOR DENYING THE PETITION

This case involves a straightforward application of the well established *Garmon* preemption doctrine by a unanimous Minnesota Supreme Court. Under *Garmon* the United States Supreme Court has long held that federal labor law preempts any state-law claim that applies to conduct that is arguably prohibited or arguably protected by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, *et seq*. In this case, the state-law tort claim on its face alleges conduct that arguably constitutes secondary boycott activity prohibited by the NLRA, 29 U.S.C. § 158(b)(4)(ii)(B). Accordingly, the Minnesota Supreme Court properly dismissed the case under *Garmon*. In a case, like this one, that involves a straightforward application of longstanding law, no "compelling reasons" exist for review by the United States Supreme Court. *See* Sup. Ct. R. 10.

This case does not involve a split of appellate court authority. It does not involve conflicts in any judicial decisions. It does not involve judicial error of

any kind. It does not involve an important but unsettled question of federal law. *See* Sup. Ct. R. 10. Instead it involves the application of a black-letter labor law precedent to a typical set of alleged facts.

Petitioner argues that the Minnesota Supreme Court decision grants "impunity" to unions that break the law. This is incorrect. According to the Minnesota Supreme Court, all that was required for Petitioner to seek redress in this case was to file a timely charge with the National Labor Relations Board ("NLRB") alleging unlawful secondary activity in violation of section 8(b)(4)(ii)(B) of the NLRA. The Court dismissed the case because it was filed in the wrong forum. A central premise of the decision is that an alternative legal remedy was available to Petitioner, and Petitioner failed to pursue it. The petition for a writ of certiorari should be denied.

I. *GARMON* PREEMPTION IS WELL ESTABLISHED LAW

In *Garmon* the United States Supreme Court ruled: "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244. The purpose of *Garmon* preemption is to avoid conflicts between state law and federal labor policy and to defer to the administrative expertise of the National Labor Relations Board ("NLRB").

The *Garmon* Court explained: "[W]hen an activity is arguably subject to § 7 or § 8 of the Act, the

States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245; *see also Farmer, Special Adm'r. v. United Bhd. of Carpenters & Joiners of America, Local 25, et al.*, 430 U.S. 290, 296 (1977) (stating that "[t]o leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress, and requirements imposed by state law."). The Minnesota Supreme Court has long followed *Garmon*. *See, e.g., Hennepin Broadcasting Assocs. v. American Fed'n of Television & Radio Artists*, 223 N.W.2d 391 (Minn. 1974) (cited and relied on at Pet. App. 27-28.)

This Court has explained that conflict between state law and federal labor policy is inevitable if separate state and federal remedial schemes apply to conduct that is arguably prohibited by federal labor law:

> It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. . . . Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," . . . the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. . . . The rule is designed

> to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," . . . and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."

Wisconsin v. Gould, 475 U.S. 282, 286 (1986) (internal citations omitted).

In this case, Petitioner seeks to invoke a state remedial scheme—a court action for tortious interference with contract—where a federal unfair labor practice remedy already exists with the NLRB for alleged unlawful secondary activity in violation of the NLRA.

II. THIS LAWSUIT IS PLAINLY PREEMPTED UNDER *GARMON* BECAUSE, ON ITS FACE, THE ALLEGED CONDUCT FALLS SQUARELY WITHIN THE NLRA'S PROHIBITION ON SECONDARY ACTIVITY.

In applying *Garmon* to dismiss the state-law tort claim, the Minnesota Supreme Court reasoned as follows:

> '[W]hen an activity is arguably subject to § 7 or § 8 of the Act,' state jurisdiction is preempted in favor of the NLRB . . . In this case, MPI alleges that Local 539 threatened to rescind its market recovery program grant in

> order to coerce MD into breaking its contract with MPI. MPI's allegations fall squarely under the [secondary activity] prohibitions outlined in section 8."

(Pet. App. 27-28) (quoting *Garmon*, 359 U.S. at 245.)

The conduct alleged in this case tracks the language of the NLRA's statutory prohibition of secondary activity to a remarkable extent. Section 8(b)(4)(ii)(B) of the NLRA makes it an unfair labor practice to "*threaten*, coerce, or restrain any person engaged in commerce or in an industry affecting commerce...*where...an object thereof is...forcing or requiring any person to cease...doing business with any other person.*" 29 U.S.C. § 158(b)(4)(ii)(B) (emphasis added). Federal labor law thus preempts state law claims that arise from alleged "secondary pressure," i.e., attempts to coerce or force a neutral employer to cease doing business with another employer. *BE & K Constr. Co. v. United Bhd. of Carpenters & Joiners of Am.*, 90 F.3d 1318, 1330 (8th Cir. 1996).

The gravamen of Petitioner's Complaint is a classic allegation of secondary pressure—the use of a "threat" to "force" a neutral employer not to do business with a non-union contractor:

> Local 539 *threatened* to rescind its promised "target money" if MPI's non-union laborers were used to perform the subcontract insulation work for the Project. [A]s a result of Local 539's *threat* to rescind its promised "target money,". . . *MD was forced by Local*

> *539 to hire a union signatory contractor to replace MPI . . .*

(Pet. App. 52-53.) (emphasis added). Thus, Petitioner's Complaint allegations fall squarely within the secondary pressure provisions of the NLRA, and the tortious interference claim is preempted under *Garmon*.

The statutory ban on secondary activity has been explained as follows:

> Section 8(b)(4)(ii)(B) essentially creates two separate requirements for [an NLRB] finding of an unfair labor practice on the part of a union: (1) The challenged union conduct must have as an object *forcing or requiring a neutral business to cease doing business* with another business; and (2) the union must pursue its object by *threatening*, coercing, or restraining the neutral business.

Soft Drink Workers Union Local 812 v. NLRB, 657 F.2d 1252, 1261 (D.C. Cir. 1980) (emphasis added); *see also Carpenters, Local 112*, 217 NLRB 902, 912 (1975). When economic pressure is placed upon a company with the objective of causing that company to cease doing business with the employer with whom the Union has its primary dispute, the pressure is secondary and unlawful.

The question of whether the union pursued a secondary object by "threaten[ing], coerc[ing], or restrain[ing]" the employer goes to the nature and foreseeable consequences of the pressure that the union actually placed on the employer. *Soft Drink*

Workers Union Local 812, 657 F.2d at 1263. Activity with a secondary object is unlawful whether the actual coercive effect is great or relatively small. *See generally NLRB v. Twin City Carpenters District Council*, 422 F.2d 309, 315 (8th Cir. 1970) (finding that picketing of general contractor with sign declaring in part "cabinets being installed on this job were not made by members" of respondent union, was proscribed secondary boycott, notwithstanding that coercive effect may not have been great). In this case, the Union's alleged threat to rescind a monetary grant of $80,000 is arguably a "threat" within the meaning of section 8(b)(4)(ii)(B) because it would have the reasonably foreseeable effect of causing MD to cease doing business with Petitioner. In fact, Petitioner alleges in its Complaint that the alleged threat did in fact "force" MD to breach its contract with Petitioner. (Pet. App. 52.)

Moreover, the alleged threat is clearly secondary in nature. Petitioner has alleged that Local 539 threatened to rescind an $80,000 market recovery grant to "pressure" or "force" MD to cease doing business with Petitioner, a non-union insulation contractor with whom the Union allegedly had its primary dispute. (Pet. App. 52.) Petitioner alleges that the threat was made in order to "pressure" or "force" MD to use a union insulation contractor rather than Petitioner: *"[A]s a result of Local 539's threat . . . MD was forced by Local 539 to hire a union signatory contractor to replace MPI."* (Pet. App. 52.) (emphasis added). This would constitute unlawful secondary pressure.

In this case, the General Counsel's Office of the NLRB issued a legal advice memorandum concurring

with the application of *Garmon* to this lawsuit because the alleged conduct arguably constitutes unlawful secondary pressure. (Pet. App. 35-36.) The General Counsel's Office issues such opinions to the regional offices of the NLRB to address legal questions in pending cases. The General Counsel's Office found that "the Union's alleged tortious conduct was, if substantiated, actually prohibited by the Act because it violated Section 8(b)(4)(ii)(B)." (Pet. App. 35.) As a result, the General Counsel's Office determined that "the lawsuit's focus on conduct actually prohibited by the Act renders it preempted under *Garmon*." (Pet. App. 36.)

III. THE MINNESOTA SUPREME COURT PROPERLY DECLINED TO ADDRESS WHETHER THE ALLEGED CONDUCT WAS *PROTECTED* BY THE NLRA BECAUSE THE CONDUCT WAS ARGUABLY *PROHIBITED* BY THE NLRA SUCH THAT *GARMON* PREEMPTION APPLIES.

Notwithstanding its Complaint allegations, Petitioner attempts to change the subject from "arguably prohibited" conduct and focus on the alternative *Garmon* inquiry—whether the alleged conduct was "arguably protected." The principal issue that Petitioner desires to present to this Court is whether the issuance of a market recovery grant is protected by section 7 of the NLRA, 29 U.S.C. § 157, if the market recovery program allegedly contains dues that were deducted on a federal project in violation of the Davis-Bacon Act, 40 U.S.C. §§ 3141-

48. Thus, Petitioner devotes its entire petition to an issue that the Minnesota Supreme Court considered irrelevant and declined to decide. The Minnesota Supreme Court explained as follows:

> MPI attempts to bypass the section 8 analysis . . . by asserting that because Local 539 violated provisions of the Davis-Bacon Act, Local 539's actions are no longer protected by the NLRA, and therefore preemption no longer applies. But MPI's suit is preempted not because Local 539's actions are protected by the NLRA, in which case illegal activity might be relevant, but rather because Local 539's actions are *prohibited*. Because Local 539's actions, as alleged by MPI, are prohibited by the NLRA under section 8, it is irrelevant whether Local 539 also violated the Davis-Bacon Act and whether that violation would take the market recovery program outside of the ambit of section 7.

(Pet. App. 28-29.) (emphasis in original). In this manner, the Minnesota Supreme Court correctly concluded that there was no need to address the issue of the extent to which market recovery grants are *protected* by federal labor law since the specific conduct in question—the threat to rescind a grant of money to force an employer not to do business with another employer—was arguably *prohibited* by the NLRA and thus preempted under *Garmon*. A writ of certiorari should not be granted to consider a question that the Minnesota Supreme Court properly declined to reach.

Moreover, it should be noted that the applicable case law contradicts Petitioner's argument that market recovery programs are not protected by section 7 of the NLRA. *See Manno Elec., Inc.*, 321 NLRB 278, 298 (1996); *see also Can-Am Plumbing, Inc.*, 335 NLRB 1217 (2001), *rev'd and remanded*, 321 F.3d 145 (D.C. Cir. 2003), *aff'd on reh'g*, 350 NLRB No. 75 (2007); *Associated Builders and Contractors, Inc.*, 331 NLRB No. 5 (2000). The cases Petitioner relies on all pertain to the issue of whether dues deductions earmarked for a market recovery program on federal prevailing wage jobs violate the Davis-Bacon Act. *See, e.g., International Broth. of Elec. Workers, Local 357, AFL-CIO v. Brock*, 68 F.3d 1194 (9th Cir. 1995); *Building & Const. Trades Dep't v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994); *Kingston Constructors*, 332 NLRB 1492 (2000). Research revealed no case, and Petitioner cites no case, finding that the operation of a market recovery program is no longer protected by section 7 of the NLRA simply because it may have received funding from dues on a federal project. Notably, the project in question was not even covered by the federal Davis-Bacon Act or the Minnesota Prevailing Wage Act. (Pet. App. 23, 59.)

Petitioner argues that market recovery programs cannot simultaneously be protected under section 7 and prohibited under section 8(b)(4) of the NLRA. The proper response is that the legality of market recovery programs depends on how they are used. Market recovery programs are protected by section 7 in most instances. *Manno Elec., Inc.*, 321 NLRB at 298. However, where, as alleged here, a union threatens to withdraw a grant of money to

force one contractor not to do business with another contractor, and the union's members do not even perform or seek to perform the work in question, then section 8(b)(4) arguably applies. *See Am. Steel Erectors v. Iron Workers Local 7*, 536 F.3d 68, 84-85 (1st Cir. 2008) (affirming dismissal under *Garmon* of state-law tort claims alleging the use of threats and coercion in the operation of a market recovery program). Because this case involved conduct arguably prohibited by section 8(b)(4) of the NLRA, the Minnesota Supreme Court did not need to reach the issue of the extent to which the market recovery program is protected by section 7 of the NLRA.

In sum, the Minnesota Supreme Court decided this case on the narrowest possible legal basis and thereby avoided entering the public policy debates that Petitioner invites the Court to entertain. Petitioner cites no compelling reason for this Court to consider a question that the Minnesota Supreme Court properly declined to address. No compelling reason exists to grant a writ of certiorari to review a straightforward application of *Garmon* preemption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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